IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 277/09
5136404

	BETWEEN	LOUISE AITKEN Applicant
	AND	WAIKATO COMBINED EQUESTRIAN GROUP INC. Respondent

Member of Authority:	Vicki Campbell
Representatives:	Joanne Watson for Applicant Tim Hale for Respondent
Investigation Meeting:	7 April 2009 at Hamilton
Determination:	14 August 2009

DETERMINATION OF THE AUTHORITY

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[1] Ms Louise Aitken was employed as Equine Manager for the Waikato Combined Equestrian Group Incorporated ("WEG"). Following a review of the management structure of WEG, the organization embarked on a restructuring process which would see an additional level of management incorporated into the Structure, a position disestablished and a new position established. Ms Aitken was subsequently dismissed by reason of redundancy on 11 August 2008.

[2] Ms Aitken challenges her dismissal which she says was unjustified as her position was changed in title only and not substantively. She seeks remedies including compensation, reimbursement of lost wages and costs. In response WEG says the redundancy was genuine and was carried out only after a period of consultation.

[3] I am required to scrutinise WEG's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[4] The test of justification does not change the longstanding principles about justification for redundancy.[1]

[5] The Authority must be satisfied on two general points – that the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Ms Aitken redundant and otherwise act in a way that was not likely to mislead or deceive her, that is, in good faith?

Was the redundancy genuine?

[6] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*[2] cemented an employers right to:

> …make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[7] Further, the Employment Court in *Simpsons Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant. A genuine redundancy is determined in relation to the position, not the incumbent. [3]

[8] Ms Aitken was subject to a written employment agreement which contains a description of the role she was employed to carry out. The Agreement defines redundancy as being a situation in which WEG has staff surplus to its requirements as a result of the reorganization or the closing down of the whole or any part of its operations due to a change in plant, methods, materials or products, economic circumstances or like cause requiring a reduction in the number of employees.

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[1] *Simpson Farms v Aberhart* [2006] 1 ERNZ 825.
[2] [1991] 1 NZLR 151.
[3] *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739.

[9] The agreement requires at least four weeks notice of redundancy be given to affected employees with a discretion by WEG to pay an employee in lieu of working the notice period. No redundancy compensation is payable under the agreement.

[10] On 18 March 2008 Ms Aitken, together with other employees, was told of a proposed new organisation structure. The changes from the current structure to the proposed structure included a new position entitled Centre Manager which was to report to the President of the Board. The other proposed change was that the position of Equine Manager would be disestablished and a new position established entitled Yard Supervisor/Equine Coach. It was anticipated that this position would report to the Centre Manager. The Equine Manager position currently reported to the Board directly.

[11] Those at the meeting were invited to provide their feedback on the proposal. Ms Aitken did this on 26 March. It is significant that Ms Aitken did not have a copy of the job description for the Yard Supervisor/Equine Coach position neither on 18 March, nor at the time she provided her feedback. It was significant, because if Ms Aitken had had a copy of the job description she would have seen that the duties and responsibilities closely resembled those in her current job description, and could have made submissions to the Board on this fact.

[12] In her feedback Ms Aitken expressed her concern that by putting in an additional level of Management the centre would have to increase its turnover by $100,000 to meet the additional costs.

[13] On 4 April 2008 Mr Tim Hale, Treasurer of WEG, advised Ms Aitken that after taking into account the feedback from all staff the Board had decided to proceed with the restructuring. Mr Hale set out a proposed time line for the restructure. The timeline only extended to the appointment of the new Centre Manager. Mr Hale advised Ms Aitken that the timetable for the appointment of the Yard Supervisor/Equine Coach position was dependent on the appointment of a Centre Manager.

[14] Ms Aitken requested a copy of the Job Descriptions for both the Centre Manager and the Yard Supervisor/Equine Coach positions. These were provided to her on 23 April 2008. Ms Aitken applied for the position of Centre Manager but was unsuccessful.

[15] Ms Aitken commenced a period of pre-planned annual leave on 12 June 2008 returning to work on 22 July. While she was absent on leave, on 18 July 2008, she was notified that she had been unsuccessful in her application for the Centre Manager's position. Ms Aitken was told that the timeframes for the appointment to the Yard Supervisor/Equine Coach position would be advised to her when she returned from her leave.

[16] On her return from leave, Ms Aitken met with Mr Hale and Mr Dave Hall. She was advised WEG was giving her two weeks notice and told her she was welcome to apply for the position of Yard Supervisor/Equine Coach.

[17] Following that meeting Ms Aitken received two letters, both dated 24 July 2008. One letter confirmed the notification she had received while she was on leave that her application for the Centre Manager's position was unsuccessful. That letter also advised that the vacancy of Yard Supervisor/Equine Coach would be advertised on the internet.

[18] The second letter informed Ms Aitken that her position of Equine Manager would be disestablished with effect from 11 August 2008. She was encouraged to apply for the Yard Supervisor/Equine Coach position. The letter also acknowledges the uncertainty for her and invited her to raise any questions or concerns.

[19] After receiving the letters, Ms Aitken emailed Mr Hale on 30 July and requested more information. She was concerned to understand whether she was to be made redundant, what her last day of work would be and why the position of Yard Supervisor/Equine Coach had been made contestable when looking at the job description, it appeared to be her job.

[20] In response Mr Hale advised Ms Aitken that the letter of 24 July was intended to be notice that she was to be made redundant on 11 August. Mr Hale acknowledged

Ms Aitken had not received the notice required under her employment agreement and advised her that she would, in addition to the notice she received, be paid two weeks pay in lieu of notice.

[21] While Ms Aitken was advised on 18 March 2008 that the position of Yard Supervisor/Equine Coach would be contestable, the reasons for that were not related to any significant changes being made to the requirements of the job, but rather to issues concerning Ms Aitken's performance. At the investigation meeting I was told of several concerns relating to complaints received about Ms Aitken's performance. However, those complaints were never put to Ms Aitken during her employment and were only made available to the Board.

[22] At the investigation meeting Mr Hale acknowledged that the position carried out by Ms Aitken and the position entitled Yard Supervisor/Equine Coach were, in essence, the same position. The only difference was that the newly titled role would report to the Centre Manager.

[23] From his correspondence to Ms Aitken during July and August, it appears Mr Hale was under the misapprehension that Ms Aitken did not have any responsibility for staff management. However, at the investigation meeting Ms Lisa-Kate Diez's undisputed evidence was that on all day to day matters, including applications for leave, she reported directly to Ms Aitken.

[24] Mr Hale was also of the understanding that until the restructuring process Ms Aitken was responsible for Grazers and areas away from the Riding School. I am satisfied that Ms Aitken had not had responsibility for Grazers since January 2008 and that she had never had responsibility for areas away from the Riding School.

[25] I find the redundancy of Ms Aitken was not genuine. As confirmed by Mr Hale, Ms Aitken's role was still in existence. Ms Aitken was dismissed because of performance issues and due to misunderstandings by the Board about what her role actually included.

Was the redundancy handled in a procedurally fair manner?

[26] The Employment Relations Act 2000[4] requires WEG to deal with its employees in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[27] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[28] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd*[5], the Court discussed the meaning of consultation in the context of redundancy and listed a serious or propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

> (a) Consultation requires more than mere notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
> (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their views.
> (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
> (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what will be done.
> (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change or even start anew.

[29] WEG certainly embarked on a consultation process, however, before providing her feedback Ms Aitken ought to have been provided with full information especially with respect to the new Yard Supervisor/Equine Coach position. This was an important omission during this consultation period, especially given Mr Hale's confirmation that the job was essentially Ms Aitken's current position.

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[4] Section 4.
[5] [1993] 2 ERNZ 429.

[30] Proper consultation would have provided Ms Aitken with the opportunity to discuss the similarities with her current position and the proposed Yard Supervisor/Equine Coach. This would have alerted WEG very early on in the process that the positions were essentially the same. Mr Hale could also have clarified other aspects of Ms Aitken's role which the Board and he were obviously mistaken about.

[31] As a result of its procedural deficiencies WEG failed to identify that Ms Aitken was not surplus to its requirements at the time she was given notice of redundancy as her job continued to exist albeit under a different title.

[32] Also, Ms Aitken was not given formal notice of the termination of her employment until 5 August. Given that her employment was to end on 11 August, the notice period, as acknowledged by Mr Hale, was significantly inadequate with respect to the requirements of the employment agreement.

[33] Separating out WEG's actions against the statutory objective standard of the actions of a fair and reasonable employer and how a fair and reasonable employer would have acted in these circumstances, I find WEG's actions fell well short of what a fair and reasonable employer would have done. Ms Aitken's dismissal for redundancy is unjustified and she is entitled to remedies.

Remedies

Contribution

[34] Section 124 of the Act requires the Authority to reduce remedies where blameworthy conduct of the employee contributed to the situation giving rise to her personal grievance. I find Ms Aitken has not contributed to the actions giving rise to her personal grievance and therefore the remedies will not be subject to any reduction.

Lost wages

[35] I am satisfied Ms Aitken took steps to find alternative employment and was successful in obtaining alternative employment by December 2008. Ms Aitken is entitled to reimbursement of wages lost for a period of 3 months from the date of her dismissal. Ms Aitken was paid for a further two weeks beyond 11 August. I have taken those two weeks into account in my calculations.

Waikato Combined Equestrian Group Incorporated is ordered to pay Ms Aitken the sum of $4,125.00 gross (being 11 weeks at $375 gross per week) pursuant to section 123(1)(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Interest

[36] Ms Aitken seeks payment of interest on the award of lost wages.

Waikato Combined Equestrian Group Incorporated is ordered to pay Ms Aitken interest on the sum of $4,125.00 from 11 August until the date of payment at the rate of 4.8% pursuant to clause 11(1) of the second schedule of the Employment Relations Act 2000.

Compensation

[37] Ms Aitken gave compelling evidence as to the hurt and humiliation she suffered as a result of her dismissal. This hurt and humiliation was exacerbated by the actions of WEG following her dismissal.

[38] By way of example, prior to her dismissal Ms Aitken joined WEG as a member and paid her membership subscription. On 28 August 2008 this membership was revoked and Ms Aitken's membership subscription reimbursed to her. Ms Aitken was also banned from entering into the WEG property.

[39] In all the circumstances of this case I am of the view that a suitable award, taking all matters into account, is the sum of $5,000.

Waikato Combined Equestrian Group Incorporated is ordered to pay Ms Aitken the sum of $5,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[40] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Aitken may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority